

Appeal from a decision of the California State Office, Bureau of Land Management, declaring the O. P. C. association placer claim, CAMC 272207, null and void in part.

Affirmed in part, vacated in part.

1. Rules of Practice: Appeals: Statement of Reasons

The party appealing a BLM decision has the burden of establishing error in the appealed decision, and must do so by a preponderance of the evidence. When an appellant does not state the reason for appeal with some particularity and support the allegation with argument or evidence showing error, the appeal cannot be favorably considered.

2. Mining Claims: Lands Subject To--Mining Claims: Placer Claims--Mining Claims: Withdrawn Land--Powersite Lands

A placer mining claim is invalid in part because it was partially located on land licensed for a power project and closed to mineral entry. Once there is a determination that lands are not available, all that remains to be done is to notify the claimant of the status of the claim affected by the power project.

3. Mining Claims: Location--Mining Claims: Placer Claims--Mining Claims: Recordation of Certificate or Notice of Location

Nothing in the law or regulations pertaining to mining claim recordation requires rejection of a location notice submitted for recordation when legal description in the notice includes two non-contiguous tracts. Therefore, it was improper for BLM to make acceptance of the location notice for recordation under 43 U.S.C. § 1744 (1994) conditional upon the submission of an amended location notice.

APPEARANCES: Robert M. Gassaway, Cedar Ridge, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Robert M. Gassaway has appealed a May 13, 1998, decision issued by the California State Office, Bureau of Land Management (BLM), declaring the O. P. C. placer mining claim, CAMC 272207, null and void in part.

On August 26, 1997, a notice of location for the O. P. C. association placer claim was filed with BLM. This claim was located by "Robert M. & Sierra Gassaway, William F. Gassaway & Linda Blunk, and Jeff & Anita Hibbard" on June 15, 1997. It embraced 120 acres, in secs. 28, 29, and 32 of T. 17 N., R. 11 E., Mount Diablo Meridian, Nevada County, California.

In its May 13, 1998, decision, BLM stated the following basis for finding the O. P. C. association placer claim null and void *ab initio*, in part:

The official records of this office show that a portion of the claimed lands in sections 29 and 32 are within active licensed Project 2310 as shown on a map filed June 2, 1969.
* * * Therefore, the third proviso of Section 2 of Public Law 359 applies to these lands. Thus, the land shown as being within Drum-Spaulding project on the enclosed [Federal Energy Regulatory Commission] FERC 2310-271, Exhibit K-19 was closed to the location of mining claims on June 15, 1997, the date of attempted location.

Consequently, that portion of the O. P. C. placer mining claim (CAMC 272207) lying within Project 2310 is hereby declared null and void ab initio--without legal effect from the beginning.

In its decision, BLM also noted that the O. P. C. association placer was split into two noncontiguous parcels by Project 2310. Referring to the provision found at 43 C.F.R. § 3842.1-3, which states that a placer claim must have no noncontiguous tracts, BLM suggested that the locators file an amended notice for the O. P. C. association placer describing only one of the two noncontiguous tracts to correct this situation, and stated that, if they failed to do so within 30 days, BLM would issue a decision rejecting the recordation of the notice of location for the O. P. C. association placer.

In his notice of appeal, Gassaway states, "I wish to either obtain permission from PG&E through an indemnity clause, or file an amendment." Nothing further was offered in support of the appeal.

[1] It is proper for BLM to declare any portion of a placer mining claim that lies within a licensed power project null and void ab initio. Alan Bruce, 133 IBLA 297, 298 (1995); Ernest Smart, 131 IBLA 44, 46 (1994); Bob & Kayla Alejandre, 125 IBLA 104, 105 (1993). The party appealing a BLM decision has the burden of establishing error in the appealed decision, and must do so by a preponderance of the evidence. Intermac, 141 IBLA 61, 63 (1997); Stewart Hayduk, 133 IBLA 346, 354 (1995). Gassaway has alleged no error, and as a result, he has not shown that BLM's finding that portion of the O. P. C. association placer claim lies within Project 2310 was in error. When an appellant does not state the reason for appeal with some particularity and support the allegation with argument or evidence showing error, the appeal cannot be favorably considered. Confidential Communications Co., 131 IBLA 188, 192 (1994); Add-Ventures, Ltd., 95 IBLA 44, 50 (1986). BLM properly declared the subject mining claim null and void ab initio to the extent that it covers land already included in a project operating under a license issued by FERC.

[2] Gassaway states that he intends to seek permission to use the powersite lands. The claims located by the appellant in Alan Bruce, *supra*, were also within FERC Project 2310. Addressing Bruce's assertions that his mining operations would not affect the power project, we concluded:

[S]ince Congress has excluded licensed lands from mineral entry, the Board may not consider special facts or provide relief to a claimant asserting mitigating circumstances; once there is a determination that lands are not available * * *, all that remains to be done is to notify the claimant of the status of the claims affected by the power permit. * * *The arguments advanced by Bruce do not alter the fact the lands in question were closed to entry; the subject claims are therefore null and void ab initio to the extent they include land covered by power licenses.

133 IBLA at 298. We have no authority to consider Gassaway's "special circumstances" or to afford him the relief he seeks.

[3] Gassaway alluded to his intent to amend his notice of location in response to the BLM decision. We see no prohibition to his doing so, although a formal amendment is not necessary. Any written statement of the claimant's intent to abandon a portion of the claim is sufficient to abandon that portion of the claim described in the document stating the claimant's intent to abandon. Jesse R. Collins, 146 IBLA 56 (1998); *see also Brown v. Gurney*, 201 U.S. 184 (1906). Further, we find nothing in the law or regulations that requires rejection of a location notice submitted for recordation when a legal description in a notice of location includes noncontiguous tracts of land. Compare Melvin Helit, 144 IBLA 230 (1998). The same law should apply to a claimant who has located a claim covering noncontiguous tracts of land open to location as is applied to a claimant

who unintentionally locates a claim that is oversized. Beginning with early cases, the courts have held that the locator of an excessive location has a right to select the part which is to be cast off, and that the claimant should have a reasonable time after he has been made aware of the excess to exercise his right of selection. McIntosh v. Price, 121 Fed. 716 (9th Cir. 1993) ¹; Waskey v. Hammer, 170 F. 31 (9th Cir. 1909), aff'd 223 U.S. 85 (1912); Jones v. Wild Goose Mining & Trading Co., 177 Fed. 95 (9th Cir. 1910). This Board has held that, in the case of an oversized claim, it was improper for BLM to make acceptance of the original location notice for recordation under 43 U.S.C. § 1744 (1994) conditional upon the submission of a subsequent amended location notice. Donald D. Hall, 95 IBLA 33, 35 (1986).

The purpose of the recordation statute, 43 U.S.C. § 1744 (1994), was to apprise the Department of the existence of mining claims on public lands. Prior to the enactment of this provision of the Federal Land Policy and Management Act of 1976, a mining claimant was not required to notify the Department of the existence of a mining claim. The thrust of the mining claim recordation statute is informational; it was never intended that this statute would serve as a vehicle for enforcing the substantive provisions of the mining law. See Melvin Helit, 147 IBLA 45 (1998). The existence of noncontiguous parcels within a single placer location involves the same kind of substantive consideration. That portion of the decision directing the amendment of the location notice to delete the noncontiguous tract within 30 days upon pain of rejection of the original location notice which had been submitted for recordation pursuant to 43 U.S.C. § 1744 (1994) is hereby vacated.

BLM should have accepted Gassaway's location notice for recordation under 43 U.S. C. § 1744 (1994), notified him that his claim embraced noncontiguous parcels, and afforded him the opportunity to confirm his

¹/ In Lindley on Mines the author stated:

"In McIntosh v. Price [supra] the circuit court of appeals, ninth circuit, after reiterating the legal principle that locations of this character were only void as to the excess, announced the rule that owners having located in good faith, being in possession and working the claim, could not be deprived of the right to select the portion of the claim they would elect to hold by an adverse entry of another party seeking to locate a portion of the same ground, and that this right of selection could be exercised within a reasonable time after the original locator had been notified or had knowledge that his location as marked on the ground was excessive. This rule is fully recognized in subsequent cases. An adverse locator attempting to relocate any part of such claim is a trespasser and his location is a nullity."

Lindley on Mines (3rd Ed.) § 448c (footnotes omitted).

claim to the substantive provisions of 30 U.S.C. § 36 (1994) by selecting the tract he intended to hold from among the noncontiguous tracts. 2/ Stenfjeld v. Espe, 171 Fed. 171 Fed. 825 (9th Cir. 1909). If, after having been afforded a reasonable time to do so, Gassaway fails to select the tract subject to the O. P. C. placer mining claim, CAMC 272207, it would be well within BLM's authority to declare the claim null and void because it had not been located in accordance with the law. 3/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part and vacated in part.

R.W. Mullen
Administrative Judge

I concur:

James P. Terry
Administrative Judge

2/ This procedure would be similar to that established for failure to file sufficient filing fees for multiple mining claims. See Norman Filip, 124 IBLA 122 (1992); Floyd Moody, 52 IBLA 153 (1981); Robert L. Steele, 46 IBLA 80 (1980). As noted in those cases, it was improper for BLM to declare all of the claims null and void, and the claimant was allowed to select the claims to which the fees would apply.

3/ When directing the claimant to abandon noncontiguous tracts BLM should keep in mind that the claimant must be afforded a reasonable time to comply, and the circumstances may be that much more than 30 days will be required to make an intelligent selection. The claimant may need to do sampling and assaying or survey the tracts and may be precluded from making the necessary investigation by weather or delayed by having to gain necessary permits.